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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978
No. 78-1481

GOOD GOVERNMENT GROUP OF SEAL BEACH, INC., et al.,

Petitioners,

-vs-

THOMAS R. HOGARD,

Respondent.

Respondent's Brief in Opposition to Petition for a Writ of Certiorari

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Respondent's Brief in Opposition to Petition for a Writ of Certiorari

Petitioners, defendants in the lower Court, present as the theme for their Petition for Writ of Certiorari, their contention that the libel action of the respondent, plaintiff below, was based solely upon the petitioners' use of the term "extorted by blackmail" in a publication authored and distributed by petitioners in 1971.

That contention finds no support in the pleadings filed or in the proceedings undertaken in the State Court. Rather, the contrary is true.

It is petitioners, not respondents, who seek to isolate that phrase from the article as a whole. Petitioners' brief does not even set forth the subject article in its entirety. Instead, they designate as the "allegedly libelous article", the text contained in the Appendix to Justice Newman's dissent to the California Supreme Court opinion of this case, without noticing that such Appendix sets forth the first five paragraphs of the article, but omits the sixth and final paragraph. A copy of that sixth paragraph is contained in the Appendix to this brief, at pages A-1 and A-2. The language of that paragraph is relevant and necessary to a determination of the defamatory character of the article, and will be further discussed as part of respondent's argument, hereinafter set forth.

REPLY TO QUESTIONS PRESENTED

Petitioners' brief suggests three basic questions for the Court's consideration. Their questions, as presented, contain much of their arguments, and assumes the unwarranted premise previously discussed. Respondent would rephrase those issues as follows:

First, petitioners ask this Court to review the California Supreme Court's interpretation of

the language of the subject article. They contend that their publication contains mere expressions of opinion and political hyperbole. Respondent has insisted, and still insists, that the language of the article is an unequivocal false charge of specific criminal activity and misconduct in public office. The California Supreme Court found a middle ground, determining the language used to be ambiguous.

Second, petitioners ask this Court to determine whether or not, in a libel action to which the New York Times privilege applies, on a motion for summary judgment, the trial judge must resolve any ambiguity that may exist in the language of the publication at issue and determine, as a matter of law, whether the words complained of were expressions of opinion or actionable statements of fact.

Third, petitioners ask this Court to define the role of the summary judgment remedy in a political libel case, and, within that procedure, review the plaintiff's burden of proof with respect to the issue of "actual malice".

REPLY TO STATEMENT OF THE CASE

Petitioners' conclusions as to the facts and circumstances attending the publication of their

defamatory article do not accurately depict those events. They piously assert that the Good Government Group of Seal Beach was a homeowners' association "committed to cleaning up the city government of Seal Beach". In actuality, it was an organization of Thomas E. Blackman, Frank B. Sales, Ed Smith (now deceased) and others, to seize control of the government of the City of Seal Beach. And indeed, these same individuals did succeed to the City Council of the City of Seal Beach after respondent's recall, and became a majority of that Council, to dominate that City's government for many years.

Respondent's former attorney, Richard Bledsoe, did file identical lawsuits for respondent (this case) and Conway Fuhrman, and did, at one time or another, represent William Robertson. But, other than as stated, the "undisputed facts" before the California Superior Court were not precisely as defined by petitioners. The termination of the City Manager and City Attorney of the City of Seal Beach were proper and legal functions of the City Council, and not the result of any "secret meeting" in violation of the City's Charter. And the reinstatement of the dance hall license of William Robertson did not involve any impropriety on the part of respondent nor generate public sentiment against him, as

petitioners would infer. Rather, the charges of illicit drugs and misconduct at the dance hall premises were never substantiated, and, after extensive public hearings, the City Council had no alternative but to reinstate the dance hall license or face protracted litigation because of its unwarranted suspension.

But it is the controversy involving the R & B Development Company, more germane to the libel of this case, that petitioners most significantly distort. In October, 1970, the City Manager and City Attorney of the City of Seal Beach, not respondent and others, withdrew the permits for the construction of the "swinging singles" apartment building complex proposed by the R & B Development Company. Thereafter, respondent, with two other councilmen, a majority of the five-man City Council, voted to impose a 90-day moratorium on construction within the City, to review the City Manager and City Attorney's action. In addition to the "swinging singles" concept, the City Council was concerned with the impact of the proposed complex on the already overburdened sewage disposal system of the City of Seal Beach.

Thereafter, the Development Company sued the City, but almost immediately offered to compromise its dispute by agreeing to abandon

the "swinging singles" concept of its proposed apartment building complex, and by paying an environmental impact tax of $100,000 to the City to provide for the enlargement and improvement of the City sewage disposal system that would be affected by their proposed construction. This offer was accepted by the City Manager, the City Attorney, the City's Redevelopment Agency, and by unanimous vote of the entire City Council, not by any "combine" of respondent and others, as suggested by petitioners' brief.

It is ironic that two of the defendants of this case, now petitioning this Court for Writ of Certiorari, held office as City Councilmen after respondent's recall, and graciously presided over the collection of the environmental impact tax that they now say was "part of a gouge". They took no steps to repeal, revoke, or disclaim the City Ordinance authorizing that tax, most of which was paid during their tenure as City Councilmen.

Petitioners review the matters concerning the petitions circulated to recall Councilman Fuhrman, but do not discuss the basis of the objections to those petitions nor the legal questions raised by the court proceedings brought to resolve those objections. Signatures were obtained from citizens of Seal Beach residing

outside of Fuhrman's councilmanic district, and the validity of those signatures presented a legitimate legal question for judicial determination.

Petitioners conclude their Statement of the Case by reference to segments of the publication here at issue. They first inaccurately designate Councilmen Hogard (respondent), Baum and Fuhrman as the "combine" named in the article. But the article designates "Robertson-Baum-Fuhrman-Hogard" as the "combine". Petitioners thus fabricated a conspiracy of respondent and other councilmen with a somewhat controversial, if not notorious, resident of Seal Beach. That stratagem is, of itself, evidence of petitioners' intent to demean and defame the respondent by their article.

ARGUMENT AND OPPOSITION TO PETITIONERS' REASONS FOR GRANTING THE WRIT

Within this section respondent will discuss the several subdivisions of petitioners' Argument by similar headings.

I

SUMMARY JUDGMENT NOT APPROPRIATE TO LIBEL BASED UPON ARTICLE THAT CHARGES CRIMINAL ACTIVITY AND MISCONDUCT IN OFFICE.

A. Role of the Summary Judgment Procedure in Libel Cases Subject to the New York Times

privilege.

This Court, in New York Times v. Sullivan, (1964) 376 U.S. 254; 11 L.Ed.2d 686, expressed its concern for the inhibiting effects of a civil libel suit on the exercise of free speech and a free press. There, this Court established a qualified privilege for the media, and apparantly everybody, where the subject of a defamatory passage was a public official. That privilege was later extended to publications concerning a public figure (Curtis Publishing Co. v. Butts (1967) 388 U.S. 130). The New York Times privilege limits recovery to the libel case where the defendant acts with knowledge of falsity or reckless disregard for truth.

The thrust of this doctrine has lead some lower courts to impose special rules for summary judgment proceedings on the political libel case. Such courts have neglected to consider the delicate balance drawn by this Court, in its limited curtailment of an individual's right to his reputation and the peaceful pursuit of his chosen calling, in favor of the greater public right to free speech and a free press. There may, of necessity, be instances where the former must yield to the latter, even though the results for a particular individual may be harsh and unfair. But nowhere, in New York Times, has this Court suggested that a public official's right to the

due process of law must be curtailed to permit one who publishes a lie a special use of the summary judgment remedy, to avoid responsibility for his act.

The conflict of decisions with respect to the summary judgment procedure in the political libel case begins with the Honorable Justice Wright's concurring opinion in the case of Wasserman v. Time, Inc., (D.D.C. 1970) 424 F.2d 920, to the effect that the trial court in a political libel case, on a pre-judgment motion, should critically weigh the evidence before it to determine the existence or absence of actual malice. At least one circuit court case has followed Justice Wright's theory (Bon Air Hotel, Inc. v. Time, Inc. (1970) 5th Circ., 426 F.2d 858). In Guam Federation of Teachers v. Ysrael (1974) 492 F.2d 438, the 9th Circuit Court has unequivocally repudiated Justice Wright's thesis:

> "However, with respect, we are not persuaded by the second phase of Judge Wright's analysis in Wasserman which suggests that, in deciding these motions, the trial court should judge the credibility of witnesses and draw its own inferences from the evidence. We think that in a libel case, as in other cases, the party against whom a motion for summary judgment, a motion for a directed

verdict, or a motion for a judgment notwithstanding the verdict is made is entitled to have the evidence viewed in the light most favorable to him and to all inferences that can properly be drawn in his favor by the trier of facts."

The Court, in Guam, supra, further declared:

"The standard against which the evidence (in a summary judgment procedure) must be examined is that of New York Times and its progeny. But the manner in which the evidence is to be examined in the light of that standard is the same as in all other cases in which it is claimed that a case should not go to the jury."

Thus, it is clear that the procedure for Summary Judgment motions, at least in the 9th Circuit, is in line with the accepted and recognized procedures designated by California Code of Civil Procedure, Section 437(c) and cases interpreting that Section (See Varco-Pruden, Inc. v. Hampshire Const. Co. (1975) 50 Cal. App.3d 654 and Keene v. Wiggins (1977) 138 Cal.Rptr. 3; 69 C.A.3d 308).

This lawsuit vividly demonstrates the impediment to the pursuit of truth and the assertation of a just cause from an abuse of the summary judgment proceeding. Although this case has survived the summary judgment process, the cost, expense

effort and delay of such proceedings have exhausted the physical, emotional and financial resources of respondent. This case has been to the California Supreme Court twice and is now the subject of petitioners' Writ of Certiorari to this Court. More than two years have elapsed since petitioners brought their motions for summary judgment, on the eve of trial. The papers and proceedings filed by petitioners in support of their motions for summary judgment and to review its denial could be measured in pounds rather than pages. Petitioners' protracted and unwarranted dilatory tactics have punished respondent beyond measure, unfairly and without justification.

B. Review of Defamatory Language of this Action.

Within their first argument petitioners again insist that respondent is concerned with but a single phrase or paragraph of the article in question. While it is true that the thrust of the libel of this case is found in the fourth paragraph of that publication, a view of that language, in context, and a study of the article in its entirety, clearly defines the unequivocal nature of the actionable defamation of this case. As previously noted, petitioners first fabricate a union of respondent and other councilmen with one William Robertson, a controversial figure in

the community of petitioners' publication. Generally demeaning references to the respondent continue throughout the article.

The document states in substance that respondent (as a member of the "combine"), continues to deny the citizens their rights, has harassed, maligned and impugned the motives of the fourth Councilman, and has needlessly expended $14,000.00 of the taxpayers' money. In the fourth paragraph, respondent is charged with a specific crime, extortion by blackmail, of a specific amount, $100,000, from a designated entity, the R & B Development Company. The article then states that "For its thirty pieces of silver (synonymous everywhere with money received for betrayal; this was the payment to Judas Iscariot for his betrayal of Jesus), the combine agreed to forego its concern for the City's ecology, pollution and strain on its sanitary system ...".

The next paragraph further discloses the petitioners' intention to defame. It refers to the "combine" (now designated as respondent, Fuhrman and Baum) as "running scared", and states that they were "given an opportunity . . . to answer specific charges of misconduct and illegal activity...", but elected not to do so.

The last paragraph is further demeaning of the respondent, although it singles out Robertson,

one of the so-called "combine", for specific attack. There, a not-so-subtle inference of criminal activity is impugned to Robertson. That paragraph suggests that an investigation of Robertson has been undertaken by the District Attorney's office and further makes obscure reference to a telephone conversation between Robertson and one Gummere, implying misconduct and compromising statements by Robertson.

C. Greenbelt v. Bresler Distinguished.

Petitioners next argue Greenbelt v. Bresler, (1970) 398 U.S. 6, 26 L.Ed.2d 6, and cite that case for the proposition that the term "blackmail" is not libel as a matter of constitutional law. But Greenbelt does not so hold. In that case, the plaintiff was attempting to obtain zoning on his property from the City, while the City sought to purchase other land that he owned. Mr. Bresler then refused to agree on a price for the property sought by the City, until he obtained the zoning he sought on his other realty. This was labeled "blackmail" by several of the defendants, and reported in the Greenbelt News Review, the title defendant. Plaintiff there brought his suit for defamation and was denied recovery by this Court decision. Petitioners correctly cited part of the Greenbelt decision, but omitted the following:

"If the reports had been truncated or distorted in such a way as to extract the word "blackmail" from the context in which it was used at the public meetings, this would be a different case. But the reports were accurate and full . . . Bresler's proposal was accurately and fully described in each article, along with the accurate statement that some people at the meetings had referred to the proposal as blackmail, and others had indicated they thought Bresler's position not unreasonable. . ."

This language makes it clear that Greenbelt v. Bresler and the case at bar are totally inconsistent. In Greenbelt, the reports were accurate and full; all of the plaintiff's activities were stated and the reader of the article would know, by the time he reached the word "blackmail", that this term was in reference to the plaintiff's bargaining for price on one parcel of land in exchange for re-zoning of another parcel, that which he had a legitimate and legal right to do, and that his conduct was not illegal in any sense of the word.

In the case at bar, the article does not mention that the $100,000 "extorted by blackmail" was the amount of an environment impact tax paid to the City of Seal Beach. The conflict between the R & B Development Company and the City of

Seal Beach was not even discussed. The "combine" is the only recipient of the $100,000 suggested by the article. In short, none of the true facts concerning the $100,000 are documented by the article, only the clear and unequivocal charge of misconduct in office and criminal activity.

II

SUMMARY JUDGMENT INAPPROPRIATE PROCEDURE FOR DETERMINATION OF AMBIGUOUS LANGUAGE IN A POLITICAL LIBEL CASE.

As previously argued, respondent views the language of the article as unequivocal statements of fact, impugning to respondent criminal activity and misconduct in office. Petitioners could not more succinctly contend that respondent, with others, extorted $100,000 by blackmail from the R & B Development Company, for their own use. But assuming, au arguendo, that the language involved was ambiguous. The California Supreme Court has held in such cases that the determination of its defamatory nature or meaning must be made by a jury or trier of facts rather than a trial judge determining a motion for summary judgment.

Petitioners reject that holding and argue in effect that some ambiguity exists in every instance involving charges against a public official,

They would relegate the resolution of any ambiguity to the court in a summary judgment proceeding because "summary judgment is a 'favored remedy' in political libel cases", and that such "threshold determination" is necessary to prevent "expensive litigation over a meritless case". But such arguments ignore the providence of the summary judgment remedy on the one hand, and the factors involved in the interpretation of the language of a political libel case on the other.

As to the first contention, respondents have previously argued that the summary judgment procedure is not, and should not be, a "favored remedy" in a case involving the New York Times privilege. As to the second contention, consideration must be given to the factors involved in the determination of whether or not particular language constitutes statements of fact or expressions of opinion. Such factors go beyond the technical and sterile scrutiny of a particular word or phrase. The many variables involved in that determination is underscored by the dissenting opinions in this case. Five out of seven justices weighing all of the facts suggested by the moving and opposing papers before the court on the summary judgment motions, made a determination that the words and phrases were ambiguous. The other two determined otherwise.

Resolution of ambiguous language of an article claimed to be defamatory necessarily extends to its meaning as understood by the reader perusing the publication. That consideration is more relevant to the determination of the libelous character of an article than any scholarly or literary interpretation of the language used. California has long followed that well recognized premise. In McLeod v. Tribune Pub. Co. (1959), 52 C.2d 536, our Supreme Court pursued that principle in the context of a libel action undertaken pursuant to the laws of California:

> "The publication is to be measured not so much by its effect when subjected to the critical analysis of the mind trained in the law, but by the natural and probable effect upon the mind of the average reader (at pg 547)."

And in Williams v. Daily Review (1965) 236 C. A.2d. 405 at 410, language was held to be libelous on its face, even though susceptible of an innocent meaning.

From the foregoing, it is apparent that the interpretation of ambiguous language in a libel action becomes a question of fact to be determined by the trier of facts, not by the Court in a summary judgment proceeding. The California Supreme Court has held, by its Opinion at issue, that the language of the article published by

petitioners was ambiguous, and has applied to this political libel case the established principle that, as to such language, it is for a jury to determine whether or not an innocent or defamatory meaning would have been given to the publication by the average reader of the article (McLeod v. Tribune Publishing, supra).

III

SUMMARY JUDGMENT BURDEN OF PLAINTIFF TO SHOW ACTUAL MALICE IN A POLITICAL LIBEL CASE

A. Rule of the Political Libel Case.

Petitioners next discuss the burden of plaintiff to show actual malice in a case within the New York Times privilege, in order to survive a motion for summary judgment. Some Federal and State Courts have required the plaintiff to show this element of such case at the summary judgment level by "clear and convincing evidence". No precise definition of that term, or guidelines for its application, have surfaced to date. A literal and strict interpretation of such a rule would preclude a plaintiff in a political libel case from recovery in virtually every instance.

The resolution of the issue of actual malice becomes a question of the defendants' subjective state of mind, and is rarely the subject of direct evidence or culpable admission. One who would practice the deliberate lie would not be likely

to admit his knowledge of falsity or reveal facts that impugn to him a reckless disregard for truth. As one Federal Circuit Court has stated:

> "In deciding whether a genuine issue of fact is raised in any case (to deny Summary Judgment), a number of general considerations are relevant. First, the right to trial by jury is at stake, so courts must be ever careful to grant summary judgment only when no issue of fact is controverted or turns upon a choice between permissible inferences from undisputed evidence ... This need for care has given rise to the valid generalizations that summary judgment must be denied when there is "doubt" whether an issue of fact has been raised, and that summary judgment is not usually appropriate when the issue raised concerns a subjective state of mind."
>
> Washington Post v. Keogh, 365 F.2d 965, 967

Rather than require a plaintiff to prove this element of his case at the summary judgment level by the strict standard suggested, respondent asks this Court to delegate this issue to the trier of facts, except in those instances where there remains no possible issue for resolution,

within the generally accepted standard of the summary judgment procedure. When dealing with an individual's intentions and his motives, many factors must be weighed. Not only is the testimony of a defendant vital to the determination of his "actual malice", but his credibility as well, including the manner in which he testifies, his demeanor while testifying, his prior statements consistent or inconsistent with his testimony in Court, and his attitude toward his giving of testimony (California's Book of Approved Jury Instructions, #2.20). Such factors can rarily, if ever, be perceived from sterile affidavits and excerpts from depositions presented to the Court in a summary judgment proceeding.

B. Consideration of Nature of Language.

The plaintiff's burden of proof on the issue of actual malice in a political libel case is always affected by the nature of the language employed by the defendant. Thus, the nature and extent of such proof will vary, depending upon whether that language is (1) libelous on its face, (2) ambiguous, or (3) opinion or political hyperbole. Respondent will discuss these several alternatives in order:

1. Article Libelous on its face: If the article is clearly libelous and contains false statements of specific misconduct or illegal activity, then plaintiff's knowledge of its

falsity would suffice, not only to raise an issue as to actual malice on summary judgment proceedings, but if admitted or undisputed, to resolve that issue in the plaintiff's favor by a summary judgment. And where unequivocal charges of specific misconduct are involved, a defendant should not be permitted to avoid his responsibility for his libel by his professed ignorance of the clear meaning of his words, or his protestations of innocent motive (Montandon v. Triangle Pub. Inc., (1975) 45 Cal.App.3d 938; 120 Cal.Rptr. 186; Patton v. Royal Industries (1968) 263 C.A.2d 760).

Such was the case here. Petitioners admitted that they always knew that respondent was not guilty of extortion, did not get the $100,000, or any part of that sum, had not committed any misconduct in office, and was not a member of any "combine". They further knew that there was no investigation by the District Attorney's office, and that respondent did not forego his concern for the City's ecology, pollution and strain on the City's sanitation system.

Such falsifying of defamatory remarks or misstatement of known facts have uniformally been held sufficient to establish the defendants' actual malice in a political libel case (Davis v. Schuchat (D.C. Cir. 1975) 510 F.2d 731; Goldwater v. Ginzburg (2nd Cir. 1969), 414 F.2d 324).

2. Ambiguous Language: Where language is ambiguous, any showing of a defendant's knowledge of the false content of his article should suffice to survive the summary judgment proceeding. It should be noted that this vital issue is dependant upon the jury's determination of whether or not the ambiguous language was understood in its defamatory sense by the readers of the article. If so, the next question of the libel case, and the political libel case, is whether the author utilized the specific language in question with intent to defame, or merely misunderstood its defamatory effect. Again, such matters are particularly within the providence of the trier of facts and should not be the subject of pre-trial determination.

As stated in McLeod v. Tribune Pub. Co., supra, at pg 550:

> "It would be a reproach to the law to hold that a defendant intent on destroying the reputation of a political opponent by falsely labeling him ... (a Communist in that case) could achieve his purpose without liability by casting his defamatory language in the form of an insinuation that left room for an untintended innocent meaning."

The California Supreme Court held the language of this case to be ambiguous, and then discussed

plaintiff's burden of proof as to actual malice. They imposed a strict burden upon respondent, and declared summary judgment to be a "favored remedy" in a political libel case. But nevertheless, they found that burden to be met from the evidence of the re-publication of the defamatory article by petitioners, after a retraction of the defamatory language was made in March, 1971. Even so, there was further proof of that actual malice submitted to the trial Court and apparently not needed by the Supreme Court, therefore not mentioned in their Opinion. Reference is made to the Declaration of Beverly Casares, wherein she stated that she was a member of the Good Government Group and present when the subject article was reviewed and approved for reprinting and distribution by that body in their January 1971 meeting. She stated that at that time, members of that group were advised that the subject article was "libel and actionable", but nevertheless authorized its printing and distribution.

3. Opinion or Political Hyperbole: If the language of the article is mere opinion or political hyperbole, the issue of "actual malice" is not presented to the Court. However, respondent does not concede that opinion can never be the subject of a libel action. While there can be no such thing as a false opinion, the defamation case is not limited always to specific charges of

misconduct. The Restatement of Torts, Section 556, carries this tort to epithets or descriptive words or opinions which carry with them the implication of acts of misconduct (See also Prosser on Torts, at pg 740).

Respondent would submit that the foregoing applies to a political libel case, where the opinion pertains to specific conduct, or was fabricated with the intent to defame.

CONCLUSION

This Court, in New York Times v. Sullivan, supra, established a qualified privilege to defame a public official. The privilege is subject to the publisher's knowledge, and fails where the publication is made with knowledge of its falsity or a reckless disregard for truth. But the privilege was meant to apply only to the innocent or negligent misstatement of fact, not to the deliberate lie. As this Court stated in Gertz v. Welch (1974) 418 U.S. 323:

> "There is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interests in 'uninhibited, robust and wide-open' debate on public issues."

The creation of a privilege creates always a

concurrent power, and all power carries with it responsibility and potential abuse. Since New York Times v. Sullivan, supra, a myriad of cases expanding, limiting and defining that privilege, have struggled with the abuse of its concurrent power. One such abuse focuses on the summary judgment procedure, where the culpable defendant may find shelter for his deliberate act by the imposition of an unconscionable burden of proof on the plaintiff. Such abuse becomes a denial of the victim's right to the due process of law.

Petitioners extoll the plight of a person who defames, faced with the rigors of a civil lawsuit. Respondent asks this Court to consider also, the plight of the person defamed, subjected to the rigors of a defendants' dilatory tactics, and the special burden placed upon him at the summary judgment level of a case, which will, in many cases, deny the pursuit of a just cause.

Such protection of misconduct does not further the pursuit of truth, nor enhance the virtues of free speech or a free press.

If this Court grants petitioners' Petition for a Writ of Certiorari, respondent requests the Court to review the language of this case, and hold the same to be neither ambiguous nor susceptible to an innocent meaning, but rather, charges of specific misconduct and illegal activity, and actionable defamation. Respondent further requests

this Court to define the roll of a summary judgment proceeding in a political libel case, so that such a proceeding may not be used to subvert justice.

DATED: April 25, 1979

Respectfully submitted,

JACQUE BOYLE
Attorney for Respondent

APPENDIX

APPENDIX

(The following constitutes the last paragraph of the libelous publication of this case, inadvertantly omitted from the Appendix attached to the dissent of Justice Newman to the California Supreme Court Opinion of this case.)

"On December 12, 1970, William L. Robertson of the teen-age Marina Palace Dance Hall tried unsuccessfully to woo and subvert "Pop" Gummere. He arranged a surreptitious meeting with Mr. Gummere where he unfolded an astonishing proposition. He guaranteed that Baum would dump Fuhrman if Mr. Gummere would call off the recall of Fuhrman and thereafter Baum would join Gummere and Holden in the issues confronting the City. He suggested to "Pop" that Mr. and Mrs. Baum, Mr. and Mrs. Gummere and of course Robertson should have dinner together to discuss the matter and work out the details. Mr. Gummere, stalling Robertson, told him that he would think about the matter and let him know his decision by 2:30 p.m. Monday, December 14th. On Sunday, December the 13th, we went to attorney Glenn Watson's office in Los Angeles, where Mr. Gummere repeated Robertson's proposition in the presence of the writer, Mr. Keeler and Mr. and Mrs. Frank Sales. On Monday afternoon Mr. Gummere, in the presence

of the writer and an investigator of the District Attorney's office, repeated Robertson's conversation to Assistant District Attorney Michael Capizzi. Upon our return to Seal Beach Mr. Gummere telephoned his wife from the writer's house and learned that Robertson had called there earlier to ask where Mr. Gummere was. Robertson left with Mrs. Gummere his unlisted telephone number in case Mr. Gummere had lost it. Mr. Gummere then telephoned Robertson and I listened in on an extension. Both Mr. Gummere and myself are prepared to execute affidavits as to what was said and by whom in that telephone conversation at the proper time."

(The article is contained in Exhibit "A" of plaintiff's Second Amended Complaint, and is attached to the Declaration of Thomas I. McKnew, as part of Petitioners' moving papers for Summary Judgment.)

-PROOF OF SERVICE BY MAIL-

JACQUE BOYLE, declares and states:

That I am a member of the Bar of the Supreme Court of the United States. That I am not a party to the within action and my business address is 707 Wilshire Blvd., #4670, Los Angeles, CA. 90017. On April 26, 1979, I served the within Respondent's Brief in Opposition to Petition for a Writ of Certiorari on all parties involved in said action, by placing three copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Richards, Watson, Dreyfuss & Gershon
Mitchell E. Abbott
333 South Hope Street, 38th Floor
Los Angeles, California 90071

and one copy each, to:

Honorable Charles S. Vogel, Judge
Superior Court, Los Angeles County
111 North Hill Street
Los Angeles, California 90012

Clerk of the Court of Appeals of the
State of California, 2nd Appellate Dist.
3580 Wilshire Blvd., Room 301
Los Angeles, California 90010

Clerk of the Supreme Court of the
State of California
4250 State Building
San Francisco, California 94102

I declare under penalty of perjury, that the foregoing is true and correct. Executed April 26, 1979 at Los Angeles, California.

Jacque Boyle
JACQUE BOYLE, Declarant
Attorney for Respondent